Supreme Court, U.S.
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No. 93-1213

In The

Supreme Court of the United States

October Term, 1993

MANUFACTURERS HANOVER
LEASING CORPORATION,

Petitioner,

v.

HAROLD G. LOWREY,
Trustee of Robinson Brothers Drilling, Inc.
and Robinson Brothers Drilling Company,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION

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RULE 29.1 STATEMENT

Respondent Harold G. Lowrey, trustee in bankruptcy for Robinson Brothers Drilling, Inc. and Robinson Brothers Drilling Co. discloses that both of the above entities were recorganized through a confirmed chapter 11 bankruptcy reorganization plan with the successor entity being named Robinson, Inc.

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STATEMENT OF THE CASE

Harold G. Lowrey ("Respondent"), trustee in bankruptcy for Robinson Brothers Drilling, Inc. and Robinson Brothers Drilling Company ("Robinson Brothers") accepts petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

As set forth in Sup. Ct. R. 10.1 "a petition for a writ of certiorari will be granted only when there are special and important reasons therefor." The sole reason stated in that rule as relevant to this case is, where the subject decision conflicts with one issued by another court of appeals, a writ of certiorari will be granted. That situation does not exist since every circuit previously facing the question raised by Petitioner has uniformly decided it.

Further, the Tenth Circuit court correctly applied Sections 547 and 550 of the Bankruptcy Code to the facts of the transaction between Petitioner and Respondent. That court found Respondent had satisfied every element of Section 547(b) to render the complained of transfer voidable. It further found that Petitioner had no defense to Respondent's claim under Section 547(c). Finally, since the transfer was void under Section 547, the circuit court found the transfer recoverable from Petitioner, as the initial transferee, under Section 550(a). Each finding was made based on a correct interpretation of Bankruptcy Code Sections 547 and 550.

ARGUMENT AND AUTHORITY

PROPOSITION I

NO SPECIAL OR IMPORTANT REASONS WITHIN THE MEANING OF SUPREME COURT RULE 10.1 EXIST.

Under the rules of this Court, a writ of certiorari is a matter of judicial discretion, to be granted only when there are special and important needs therefor. (Rule 10.1). The only reason among those presented in the rule applicable to this case is:

> When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter, or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. (Rule 10.1(a)).

Petitioner appears to seek to bring its request under this classification in arguing that a conflict among the Courts exists. But that argument is flawed.

Petitioner incorrectly states that only two other circuit courts have followed the decision in the initial case addressing the "insider guaranteed" preference issue, *Levit v. Ingersoll Rand Financial Corp.*, (In re V.N. DePrizio Construction Co.), 874 F.2d 1186 (7th Cir. 1989) (Pet. Brf. 12). Supplementing the decisions cited by Petitioner (*In re C-L Cartage Co.*, 899 F.2d 1490 (6th Cir. 1992) and *In re Suffola*, 2 F.3d 977 (9th Cir. 1993)), the Fifth Circuit also accepted the reasoning of *DePrizio* in its decision of *In the*

Matter of Southmark Corp., 993 F.2d 117, 120 (5th Cir. 1993). There has been no conflict between the circuits having addressed the question brought here by petitioner. Five circuits, the Fifth, Sixth, Seventh, Ninth and Tenth, have all faced the issue, each deciding it the same way – contrary to Petitioner's view.

The lower court cases cited by petitioner employed one legal fiction or another to escape the literal application of Bankruptcy Code ("Code") Sections 547 and 550. A Pennsylvania bankruptcy court created what it called the "two transfer" theory, making two transfers out of one actual transfer, in attempting to avoid applying the Code as written. *In re Mercon Industries, Inc.*, 37 B.R. 549 (Bankr. E.D. Pa. 1984). Other courts used what they perceived to be the equitable powers granted them under Code Section 105 to avoid a deemed inequitable result obtained from the literal application of a trustee's avoidance powers under Code Sections 547 and 500. *In re R.A. Beck Builder, Inc.*, 34 B.R. 888 (Bankr. W.D. Pa. 1983); *In re Aerco Metals, Inc.*, 60 B.R. 77 (Bankr. N.D. Tex. 1985). Respondent does not dispute that most district and bankruptcy courts, when presented this issue followed one of these two theories. But it is a fact that no circuit court facing the question has equivocated from adopting the *DePrizio* rationale. There is no reason to believe that when the decisions of the various bankruptcy and district courts reach the circuit level, the respective circuits will hold differently from the five which have already issued decisions. The uncertainty and continued dilemma of which Petitioner warns does not exist. This is not a proper case for which certiorari should be granted.

PROPOSITION II

THE COURT OF APPEALS CORRECTLY INTERPRETED CODE SECTIONS 547 AND 550

In arguing that the Court of Appeals failed to give effect to material statutory language of Code Sections 547 and 550, Petitioner incorrectly interprets Code Section 547. Petitioner says:

> Had the circuit court simply attempted to determine if all the elements of an avoidable preference contained in § 547 were present as to Manufacturers Hanover with respect to the transfers in issue, it would have found that subsection (b)(4) was not satisfied since such transfers were made beyond the 90-day period of subsection (b)(4)(A) which is applicable to non-insiders. (Pet. Brf. 16).

Petitioner's argument misses the distinction that, under Section 547(b), a transfer need be found voidable only as to the insider in order to be recovered from the non-insider under Section 550.

Section 547(b), as relevant here, states:

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property –
>
> (1) to or for the benefit of a creditor;
>
> * * *
>
> (4) made –
>
> * * *
>
> (b) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of the transfer was an insider; . . .

Since the transfer to Petitioner provided a benefit to an insider of the Debtor, it was voidable under Section 547(b). That law does not require a trustee to satisfy his Section 547(b) responsibility as to both the debtors' insider and non-insider to render a transfer voidable.

Section 547(g) imposes the burden on a trustee to prove every element of Section 547(b) for a transfer to be avoided. Once a trustee has satisfied that requirement, the burden is on the defendant to prove nonavoidability of a transfer under Section 547(c). The bankruptcy, district and circuit courts all found that the Trustee had proven each of the Section 547(b) elements present as to the debtor's insider. Petitioner was unsuccessful in proving to any of those courts the nonavoidability of the transfer under Section 547(c). Since the transfer was subject to avoidance, it is then necessary to examine Section 550.

Petitioner says the circuit court decision was erroneous:

> [S]ince it completely ignores the qualifying language of § 550(a) which permits recovery only "to the extent that a transfer is avoided under- . . . section 547." (Pet. Brf. 17).

As well as being denied by the Tenth Circuit court, Petitioner's argument was addressed and dismissed in *Suffola*. (Supra at 982). Interpreting Section 550(a), the Ninth Circuit agreed with *DePrizio's* statement that:

> The "to the extent that" language simply recognizes that transfers sometimes may be avoided only in part, and that only the avoided part of the transfer is recoverable. *DePrizio*, supra at 1196.

As *Suffola* went on to say:

> Although the Bank is not completely clear on the basis for its argument that it is "protected . . . from the avoidability of the [p]ayment", we are certain that it needs no such protection, for it is the transfer, not the Bank, that is avoided. The Bank seeks relief from liability ("recoverability") that is not afforded it by Sec. 550(a), the controlling section. *Suffola*, supra.

This reasoning blunts Petitioner's instant argument just as it did that of the bank involved in *Suffola*.

Only if the language quoted by Petitioner stated "to the extent that a transfer is avoided *as to the particular creditor* under . . . section 547" would this argument have validity. But the statute does not include that significant qualification. Instead, Section 550(a) says:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, *the trustee may recover*, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, *from*–
>
> > (1) *the initial transferee of such transfer* or the entity for whose benefit such transfer was made;. . . . (emphasis added)

Here, since the entire transfer was avoided under Section 547(b),the Trustee may recover from Petitioner, as the "initial transferee", the total amount of the avoided transfer.

Finally, Petitioner confuses matters further saying:

> But this concession fatally undercuts the rationale of the circuit court decision and the cases upon which it relies. Under that rationale, subsection (c) defenses of the non-insider creditor, like subsection (b) defenses, should not be considered at all once a transfer is avoidable under § 547(b) as to the insider guarantor, since the so-called "plain language"of § 550 entitles the trustee to recover from the non-insider creditor, i.e., the "initial transferee," without regard to whether the transfer would be independently subject to avoidance as to that creditor. (Pet. Brf. 18).

Petitioner's argument ignores the fact that a creditor's defenses under Section 547(c) are available to both the insider creditor and the non-insider creditor. For example, if an insider creditor had advanced new value in exchange for a transfer, even though that insider might otherwise satisfy the criteria of Section 547(b), it could avail itself of the defense under Section 547(c)(1) to defeat a trustee's avoidance action. Here, Petitioner was allowed to present what it considered its Section 547(c) defenses at a trial before the bankruptcy court in February 1991, being unsuccessful in that effort. While Sections 547(b) and 547(c) are parts of the same law, they are not "two sides of the same point" as Petitioner claims. (Pet. Brf. 15). Instead, they are two separate tests, one to be satisfied by a trustee, the other to be met by the transferee/defendant. (Section 547(g)). The circuit court ignored nothing in arriving at its interpretation of Sections 547 and 550.

CONCLUSION

Contrary to Petitioner's statement, the five courts of appeal previously addressing the so-called *DePrizio* rule have each adopted it. The refusal of some bankruptcy and district courts to follow these circuit court decisions will be addressed by their respective circuit courts. And the circuit court did not misinterpret Bankruptcy Code Sections 547 and 550. It is Petitioner which misinterprets those laws in failing to acknowledge the plain meaning of the statutes.

Five circuits have refused the treatment Petitioner claims it should receive. Petitioner has shown no convincing reason for this Court to exercise judicial discretion under Rule 10.1(a) to grant a writ of certiorari in this case. This Petition should be denied.

Respectfully submitted,

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